

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BAODING TIANWEI GROUP CO.,
LTD., a foreign entity,

Plaintiff,

v.

PACIFICORP, an Oregon
corporation,

Defendant.

No. CV 07-862-HU

OPINION AND
ORDER

PACIFICORP, an Oregon
corporation,

Third Party Plaintiff,

v.

WINBO INTERNATIONAL
CORPORATION, a California
corporation, and SUPER
POWER EQUIPMENT CO., a
California corporation,

Third Party Defendant.

SUPER POWER EQUIPMENT CO.,
WINBO INTERNATIONAL
CORPORATION,

Counterclaimants,

v.

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1 BAODING TIANWEI GROUP CO.,)
)
 2 Counter Defendant.)
)

3
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 Kjersten H. Turpen
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17 HUBEL, Magistrate Judge:

18 The matters before the court are Pacificorp's motion for
 19 summary judgment (doc. # 49) and the motion by Super Power
 20 Equipment Company (Super Power) to stay and to compel arbitration
 21 (doc. # 44). Winbo International Corporation (Winbo International)
 22 joins in Super Power's motion (doc. # 84).

23 **Factual Background**

24 On August 16, 2001, Winbo International and Baoding Tianwei
 25 Group (Baoding or BTW) entered into an agency agreement under which
 26 Winbo International was to be the exclusive agent for Baoding in

1 the United States for the supply and sale of electrical
2 transformers manufactured by Baoding. Declaration of Thomas R.
3 Johnson (Johnson Declaration), Exhibit 3; Declaration of Lucy Ni
4 (L. Ni Declaration), ¶ 2. On or about the same day, Winbo
5 International and Baoding entered into a Cooperation Agreement on
6 Phase Modulation Transformer ("cooperation agreement") which
7 provided that Winbo International would transfer certain technology
8 to Baoding for the design and manufacture of phase transformers in
9 exchange for an agency fee in connection with all sales of such
10 transformers outside China. Johnson Declaration Exhibit 4; L. Ni
11 Declaration ¶ 3.

12 On December 3, 2001, Pacificorp executed a Letter of Intent to
13 purchase one transformer from Winbo International, for its Dave
14 Johnston Plant. Johnson Declaration, Exhibit 6. The purchase of the
15 transformer for the Dave Johnston plant was formalized in Purchase
16 Contract No. 4500122784 (Johnston Contract). The Johnston Contract
17 was executed by Pacificorp on November 12, 2002, and by Winbo
18 International on behalf of itself and Baoding on November 27, 2002.
19 Johnson Declaration, Exhibit 10, p. 9.

20 On March 29, 2002, Baoding and Winbo International entered
21 into an agreement supplementing the cooperation agreement and the
22 agency agreement (the supplementary agreement), under which it was
23 agreed that if Baoding sold its products directly or indirectly in
24 Winbo International's region without Winbo International's consent,
25 Baoding would be deemed in breach of the contract and would pay a
26 fine of 25% of the total amount of the contract. Johnson
27

1 Declaration, Exhibit 5; L. Ni Declaration ¶ 3. The supplementary
2 agreement states that it "shall be a part of the original
3 Agreements and shall be of equal legal effect as the original
4 Agreements." The supplementary agreement also provides:

5 In the event of changes in the Companies of both Parties
6 (such as changes to the name or nature of the Company),
7 the foregoing Agreements and this Supplementary Agreement
 shall automatically be binding upon the new Company
 without separate execution.

8 Johnson Declaration, Exhibit 5 ¶¶ 4, 5. The supplementary agreement
9 provides that disputes unresolved through consultations are to be
10 referred to the Chinese International Economic and Trade
11 Arbitration Commission, and that the agreement is governed by
12 Chinese law. Id. at ¶ 2.

13 On July 3, 2002, Baoding executed a Letter of Authorization,
14 addressed to Pacificorp, confirming Winbo International as its
15 exclusive agent. Johnson Declaration, Exhibit 2; Amabile
16 Declaration, Exhibit A.

17 On July 6, 2002, Winbo International and Baoding executed an
18 agreement relating to the Johnston contract, under which Baoding
19 agreed that it would not communicate directly with Pacificorp on
20 commercial issues, and that it would receive payment from Winbo
21 International within 75 days of Winbo International's receipt of
22 payment from Pacificorp. Johnson Declaration, Exhibit 7. Pacificorp
23 received a copy of this agreement. Amabile Declaration ¶ 4.

24 On October 16, 2002, Pacificorp issued a purchase order for
25 two phase angle transformers for its Monument substation from Winbo
26 International. Johnson Declaration, Exhibit 8. The purchase of the

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1 transformers for the Monument substation was formalized in Purchase
2 Contract No. 3000016931 (the Monument contract). The Monument
3 contract was executed by PacifiCorp on October 28, 2002, and by
4 Winbo International on behalf of itself and Baoding on November 27,
5 2002, the same day it executed the Johnston contract. Johnson
6 Declaration, Exhibit 11, p. 10.

7 On December 12, 2002, Winbo International and Baoding executed
8 an agreement relating to the Monument contract, under which Baoding
9 agreed that it would not communicate directly with PacifiCorp on
10 commercial issues, and that it would receive payment from Winbo
11 International within 15 days of Winbo International's receipt of
12 payment from PacifiCorp. Johnson Declaration, Exhibit 9. The record
13 does not reveal whether PacifiCorp received a copy of this
14 agreement.

15 The Johnston contract and the Monument contract (collectively
16 called the purchase contracts) designated both Winbo International
17 and Baoding as "Seller." Johnson Declaration, Exhibits 10 and 11
18 (purchase contracts). However, Winbo International conducted all
19 negotiations for the sale of the transformers to PacifiCorp.
20 Baoding was not involved in the contract negotiations. L. Ni
21 Declaration ¶¶ 4, 8, 10. Baoding acknowledges that all negotiations
22 were conducted by Winbo International, on its behalf. Plaintiff's
23 Response to PacifiCorp's CSF ¶ 17.

24 The purchase contracts by their terms do not separate the
25 rights and obligations of Baoding and Winbo International,
26 including the right to receive payment from PacifiCorp. Baoding
27

1 issued invoices directly to Winbo International and received
2 payments from Winbo International related to the purchase
3 contracts. Johnson Declaration, Exhibit 15 (sample invoices from
4 Baoding to Winbo International and payments from Winbo
5 International to Baoding); Plaintiff's Response to Pacificorp's CSF
6 ¶ 18.

7 All invoices provided to Pacificorp for the purchase contracts
8 were issued by Winbo International. Baoding never invoiced
9 Pacificorp for the purchase contracts. L. Ni Declaration, ¶ 12;
10 Declaration of Karen Amabile ¶ 5; Johnson Declaration, Exhibit 13
11 (invoices to Pacificorp); Johnson Declaration, Exhibit 14
12 (plaintiff's response to defendant's first request for admissions
13 No. 4 and 5). Through email correspondence, Baoding instructed
14 Pacificorp to contact Winbo International directly about payments.
15 Johnson Declaration, Exhibit 16 (June 13, 2003 email from Baoding
16 to Pacificorp).

17 Pacificorp asserts, and Baoding does not deny, that it was
18 understood by all parties to the purchase contracts that Pacificorp
19 would remit payment to Winbo International and Winbo International
20 would remit payment to Baoding. L. Ni Declaration ¶ 7; Johnson
21 Declaration Exhibits 7 and 9 (July 2002 and December 2002
22 contracts); Amabile Declaration, Exhibit B (July 2002 contract);
23 Plaintiff's Response to Pacificorp's CSF ¶ 20.

24 The Johnston contract had a price increase, and later a price
25 decrease, both of which were negotiated between Pacificorp and
26 Winbo International. L. Ni Declaration ¶¶ 8, 9. According to the

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1 Supplemental Declaration of Lucy Ni, after delivery of the
2 transformer purchased by Pacificorp under the Johnston contract,
3 Pacificorp complained of errors and delays. Supplemental L. Ni
4 Declaration ¶ 6. Lucy Ni states that "Winbo/Super Power acted as
5 Baoding's agent in negotiating the resolution of Pacificorp's
6 complaints," id., and kept Baoding informed of the status of the
7 negotiations. Id. These negotiations ultimately resulted in an
8 offset to the final contract price. Id.

9 The purchase contracts required the issuance of letters of
10 credit by "Seller" to warrant the products. The letters of credit
11 were negotiated and issued by Winbo International. Ni Declaration,
12 ¶¶ 8, 10, 11; Johnson Declaration, Exhibit 12 (letters of credit);
13 Plaintiff's Response to Pacificorp's CSF ¶ 20, 16.

14 In August 2003, Winbo International notified Pacificorp that
15 it had changed its name to Super Power. On August 28, 2003,
16 Pacificorp sent a letter to Diana Ni requesting written
17 acknowledgment from her of the company's name change from Winbo
18 International to Super Power for Pacificorp's records. Pacificorp
19 also asked that, pursuant to Article 14, "Assignment," of the
20 purchase contracts, its letter serve as an amendment to the
21 purchase contracts reflecting the change in the name of the seller.
22 Johnson Declaration, Exhibit 1. Baoding denies that the purchase
23 contracts were amended to reflect the name change. Plaintiff's
24 Response to Pacificorp's CSF ¶ 23.

25 Pacificorp remitted payments to Winbo International and,
26 later, to Super Power under the purchase contracts. See Johnson
27

1 Declaration, Exhibit 13 (some invoices requesting payment to Bank
2 of America Standby Letter of Credit Department account of Winbo
3 International and some requesting payment to the same account with
4 Super Power shown as the beneficiary). The final payment was made
5 on or about March 3, 2004. Amabile Declaration ¶ 6, Exhibit C
6 (spreadsheet detailing payments made by Pacificorp, first to Winbo
7 International and then to Super Power); L. Ni Declaration ¶ 3;
8 Johnson Declaration, Exhibit 17 (bank statements and cancelled
9 checks reflecting payments from Pacificorp to Winbo International
10 and to Super Power). Pacificorp asserts that no monies are due and
11 owing by Pacificorp under the purchase contracts, because it paid
12 in full the amounts owed under the Monument contract and the
13 reduced price as negotiated for the Johnson contract. L. Ni
14 Declaration ¶ 13; Amabile Declaration ¶ 10. Baoding does not deny
15 that Pacificorp paid in full the amounts negotiated under the
16 Monument and Johnston contracts, but denies that Baoding received
17 all the monies to which it was entitled under the purchase
18 contracts because Pacificorp made some payments to Super Power,
19 rather than Winbo International, citing Johnson Declaration,
20 Exhibit 17 (showing some payments to Winbo International and some
21 payments to Super Power). See Plaintiff's Response to Pacificorp's
22 CSF ¶ 21.

23 On September 11, 2005, Baoding sent an email to Pacificorp
24 notifying Pacificorp that it had revoked Winbo International's
25 agency authorization. Johnson Declaration, Exhibit 18. The email
26 states that as a result of the revocation,

1 Winbo is no longer qualified to bid, sign purchase
2 orders, receive payment, and/or perform under the
3 pertinent contracts in the name of [Baoding.] Therefore,
4 [Baoding] would certainly wish to settle any amounts
outstanding by Pacificorp to [Baoding] for the Purchase
Orders in the payment issues between Pacificorp and
[Baoding].

5 Id.

6 **Standard**

7 A party is entitled to summary judgment if the "pleadings,
8 depositions, answers to interrogatories, and admissions on file,
9 together with affidavits, if any, show there is no genuine issue as
10 to any material fact." Fed. R. Civ. P. 56 (c). Summary judgment is
11 not proper if material factual issues exist for trial. Warren v.
12 City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). A genuine
13 dispute arises "if the evidence is such that a reasonable jury
14 could return a verdict for the nonmoving party." State of
15 California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003). Where
16 the record taken as a whole could not lead a rational trier of fact
17 to find for the non-moving party, there is no genuine issue for
18 trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.
19 574, 587 (1986).

20 On a motion for summary judgment, the court must view the
21 evidence in the light most favorable to the non-movant and must
22 draw all reasonable inferences in the non-movant's favor. Clicks
23 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir.
24 2001). The court may not make credibility determinations or weigh
25 the evidence. Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55
26 (1990).

Discussion

A. Pacificorp's Motion for Summary Judgment

Pacificorp's motion for summary judgment rests on an assumption, not undisputed, that Winbo International and Super Power are the same entity with different names. On the basis of this assumption, Pacificorp argues that its payment to Super Power constituted payment to Baoding, under the rule of agency that payment to an agent authorized to receive it is payment to the disclosed principal. See Alderman v. Davidson, 954 P.2d 779, 783 (Or. 1998).

Pacificorp argues that the agreements and related documents show that Baoding granted Winbo International/Super Power express authority over the transactions involving the sale of the transformers, including the receipt of payment, through the agency agreement, the cooperation agreement, and the supplementary agreement. The course of conduct of Baoding was consistent throughout with the agreements: Baoding never directly negotiated or executed a contract with Pacificorp, Baoding expressly conferred authority on its agent to handle the collection of payments, and Baoding expressly agreed not to communicate with Pacificorp on commercial matters.

Pacificorp argues that accordingly, no issue of fact remains to be resolved, and Pacificorp is entitled to summary judgment that it has met its obligations to Baoding by making payment in full to Super Power.

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1 As an alternative to the agency theory, Pacificorp argues that
2 Winbo International/Super Power and Baoding are joint obligees
3 under the purchase contracts, with identical pecuniary interests.
4 The contracts do not create separate obligations between them, and
5 in fact establish that the obligation owed by Pacificorp is payment
6 to the "Seller," identified as Baoding and "Super Power."
7 Pacificorp argues that Baoding and "Super Power" jointly held the
8 right to payment, so that payment to one satisfied the obligation
9 of payment to the other.¹

10 Baoding responds that Pacificorp is not entitled to summary
11 judgment because Super Power and Winbo International are separate
12 entities, Baoding never had an agency agreement with Super Power,
13 and Super Power is a stranger to the purchase contracts. In support
14 of this argument, Baoding proffers online records from the
15 Corporations Division for the California Secretary of State showing
16 that Super Power and Winbo International have been assigned
17 different corporate registration numbers. Declaration of John R.
18 Barhoum ¶ 2, Exhibit 1. According to the Barhoum Declaration,
19 Baoding made a request to the California Corporations Division for
20 "all documents evidencing or relating to any name change by Super
21 Power," and received nothing, but the record of a name change from
22 Winbo USA Group to Super Power. Barhoum Declaration, ¶¶ 3, 4;
23 Exhibit 3 (amendment to articles of incorporation for Winbo USA
24

25 ¹Although there were letters and emails between Pacificorp
26 and Super Power indicating an intention to amend the purchase
27 contracts to reflect that Winbo International was now named Super
28 Power, the record does not contain executed amended contracts.

1 Group changing the name of the corporation to Super Power Equipment
2 Co.).² The record before the court does not explain the
3 relationship, if any, among Winbo USA Group, Winbo International,
4 and Super Power, although I note that exhibits to the Supplemental
5 Johnson Declaration indicate that both Lucy Ni and Diana Ni
6 received emails at "winbo.us" Declarations from Lucy Ni state that
7 she was employed by Winbo International and is now employed by
8 Super Power. Consequently, an email address for Lucy Ni at
9 "winbo.us" suggests, at the very least, that Winbo International,
10 Winbo US and Super Power had some employees in common.

11 The Barhoum Declaration states further that "this office"
12 (i.e., the law firm of Dunn Carney) has not seen any documents
13 indicating that Super Power and Baoding were parties to any agency
14 agreement or other contract, and that it "expect[s] the evidence
15 will show that Baoding and Super Power had no relationship, agency
16 or otherwise." Id. at ¶ 6. The Barhoum Declaration also states that
17 "[w]e expect the evidence will show that Baoding never received
18 notice of the purported name change." Id. at ¶ 7.

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21 ²Also attached to the Barhoum Declaration, as Exhibit 1, is
22 a printout from the California Corporations Division showing
23 Winbo International Corporation as a "suspended" corporation and
24 Super Power Equipment Co. as an "active" corporation. Winbo
25 International's corporate registration shows an address of 5700
26 Stoneridge Mall Road #325, Pleasanton, California and Chao Wen Ni
27 as its designated agent for service of process, at the same
28 address. Super Power's corporate registration shows an address of
5882 Turnberry Drive, Dublin California and Lucy Ni as its
designated agent for service of process, at 7062 Briza Loop in
San Ramon, California. Id.

1 On the basis of the circumstantial evidence from the
2 California Corporations Division and anticipated evidence--or lack
3 of evidence--Baoding argues that 1) Pacificorp made at least some
4 of its payments to the wrong entity, Super Power, a stranger to the
5 contracts; 2) there is a genuine issue of material fact as to
6 whether Pacificorp knew or should have known that Super Power would
7 not tender Pacificorp's payments to Baoding; and 3) that in any
8 event, Pacificorp "admits" that it did not make full payment under
9 the purchase contracts, because the price reduction on the Johnston
10 contract was negotiated with Super Power, which did not have
11 authority from Baoding to reduce the price.

12 1. Has Baoding generated a genuine issue of material
13 fact on whether Winbo International and Super Power
are separate entities?

14 The issue is whether non-movant Baoding has met its burden on
15 summary judgment of proffering evidence sufficient to create a
16 genuine issue of material fact on its claim that Winbo
17 International and Super Power are not the same entity. The evidence
18 from the California Corporations Division is somewhat probative
19 that they are not, and all reasonable inferences from this evidence
20 must be drawn in Baoding's favor. The only other evidence Baoding
21 has proffered is the Declaration of Xia Wei. This declaration is
22 not sworn or made under penalty of perjury. It is signed, not by
23 the declarant, but on behalf of Baoding. See Declaration of Xia
24 Wei, p. 2. The declaration states that Xia Wei is the vice general
25 manager of Baoding, and that Baoding "did not consent to, nor have
26 any knowledge of, Pacificorp's alleged payments to" Super Power.

1 Id. at ¶ 2. The declaration states further that Baoding and Super
2 Power have "never been parties to an agency agreement or other
3 contract," that Baoding "does not have a relationship with Super
4 Power, contractual or otherwise," and that to Xia Wei's knowledge,
5 "Baoding never received notice from Winbo that it purportedly
6 changed its name to Super Power." Id. at ¶¶ 3, 4. Xia Wei's
7 knowledge is not necessarily co-extensive with Baoding's knowledge
8 and imputed knowledge. Xia Wei's declaration states that Winbo did
9 not have authority from Baoding to accept less than full payment
10 under the purchase contracts.

11 Pacificorp challenges the admissibility of Wei's declaration
12 in its brief. See Pacificorp Reply Memorandum, p. 4, n. 5. I find
13 it unnecessary to consider this challenge, because regardless of
14 whether the Xia Wei declaration is admissible, the statements made
15 do not create a genuine issue of material fact about whether Winbo
16 International is or is not Super Power under another name.

17 2. Has Baoding generated a genuine issue of material
18 fact as to whether Pacificorp knew or should have
19 known that Super Power would not tender
20 Pacificorp's payments to Baoding?

21 Baoding relies on Pacificorp's ability to access the
22 California corporation records, had it wanted to, to support
23 Baoding's argument that Pacificorp knew or should have known that
24 Winbo International and Super Power were different entities. To
25 support this argument, Baoding relies on two pieces of
26 correspondence between Pacificorp and Super Power discussing the
27 name change, neither of which indicates a copy to Baoding.

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1 One is an email dated July 22, 2003 from Lucy Ni to John
2 Guerin of Pacificorp, copied to Diana Ni and discussing the name
3 change. The email states that Winbo International is changing its
4 name to Super Power. Barhoum Declaration, Exhibit 3. The second
5 piece of evidence is a letter from Pacificorp to Super Power on
6 August 28, 2003, acknowledging the name change, which similarly
7 does not indicate that Baoding was copied.

8 I am unpersuaded by Baoding's argument that the absence of any
9 indication that Baoding was copied on this correspondence
10 necessarily creates an inference that 1) Baoding was unaware of the
11 purported name change; and 2) Pacificorp knew Baoding was unaware.
12 Such an inference is further weakened by the evidence discussed
13 above that, subsequent to the events giving rise to this action,
14 Baoding received payments from Super Power and entered into
15 contracts with Super Power. Johnson Declaration, Exhibit 15 (Bank
16 of America transfer of \$477,090 from Super Power to Baoding);
17 Supplemental Johnson Declaration, Exhibit 1 (email dated September
18 30, 2003 from Lucy Ni to "Kevin" at Baoding stating that she has
19 read a draft contract between Baoding and Super Power, adding some
20 changes, and attaching the contract signed by Super Power).

21 Super Power's briefing materials for its motion to compel
22 arbitration contain another piece of evidence which creates the
23 inference that Baoding knew Winbo International had become Super
24 Power. Those materials contain a Declaration of Lucy Ni which
25 states that Lucy Ni notified Baoding of the name change from Winbo
26 to Super Power. Declaration of Lucy Ni in Further Support of Third
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1 Party Defendant Super Power Equipment Co.'s Petition to Compel
2 Arbitration ¶ 6 and Exhibit A (email in Chinese); Declaration of
3 Pei Ling Haussecker, Exhibit C (English translation of Ni email in
4 Chinese).

5 According to this declaration, as Assistant General Manager at
6 Winbo International Corp., Lucy Ni was personally involved in the
7 "designation of Super Power to carry on Winbo's ongoing transformer
8 sales operations." Ni Declaration ¶ 3. She states that "Super Power
9 is [a] closely held corporation wholly owned and operated by the
10 owners, officers, and managers of Winbo, another closely held
11 corporation, and conducts its transformer sales operations with the
12 same employees as did Winbo." Id.

13 According to Ms. Ni, in mid-2003, the owners, officers and
14 managers of Winbo International "decided to conduct their ongoing
15 transformer sales operations under the Super Power name," id. at ¶
16 5, and that on or about June 9, 2003, she sent via fax to Baoding
17 "a written notice of Winbo's intention to perform its transformer
18 sales operations pursuant the [sic] Winbo-Baoding Agreements under
19 the Super Power name." Id. at ¶ 6. The Chinese copy of that notice
20 is attached to her declaration as Exhibit A. She states that she
21 "understand[s] that an English translation of this notice has been
22 prepared and is being filed herewith." Id. The English translation
23 of the notice is attached to the Declaration of Pei Ling
24 Haussecker, submitted with the motion to compel arbitration. The
25 translation is as follows:

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1 Dear Director Tang, how are you?

2 To better serve our customers and develop international
3 market more broadly, our company's name will be changed
4 to Super Power Equipment Company to deal with our
5 existing customers and potential new customers and to
6 provide our services according to the "Agency Agreement,"
7 "Cooperation Agreement," and "Supplementary Agreement."

8 Winbo International Corporation

9 Haussecker Declaration, Exhibit B.

10 Ms. Ni states that after about June 2003, Super Power "assumed
11 the duties and obligations of Winbo arising from and related to the
12 Winbo-Baoding agreements," including 1) maintaining an office in
13 the United States for Baoding; 2) promoting Baoding's transformer
14 products; 3) assisting Baoding in collecting payments from
15 transformer purchasers; and 4) remitting payments directly to
16 Baoding. Ni Declaration at ¶ 8. Attached to the Ni Declaration as
17 Exhibit C is the Funds Transfer Request that Super Power sent to
18 Baoding in connection with a \$477,090 USD payment that Super Power
19 made to Baoding. Id. at ¶ 8.³ Ms. Ni states that except in
20 connection with this litigation, to her knowledge, "Baoding never
21 communicated to Winbo or Super Power any objection to Super Power's
22 assumption of Winbo's duties, obligations, and performance under
23 the Winbo-Baoding Agreements." Id. at ¶ 9.

24 Baoding's evidence is not sufficient to create a genuine issue
25 of material fact from which a reasonable jury could find that
26 Baoding was unaware Winbo International was doing business as Super
27 Power, and that Pacificorp knew or should have known Baoding was

28 ³ This is the same document discussed above, Exhibit 15, p.
3 of the Johnson Declaration.

1 unaware and therefore should have made contract payments directly
2 to Baoding rather than to Super Power.

3 I turn now to Baoding's argument that, even assuming Super
4 Power is a successor entity to Winbo International, Pacificorp
5 knew, or should have known, that Baoding could not collect payment
6 against a mere successor entity because the general rule in Oregon
7 is that when one corporation purchases all of the assets of another
8 corporation, the purchasing corporation does not become liable for
9 the debts and liabilities of the selling corporation, citing Tyree
10 Oil, Inc. v. BOLI, 168 Or. App. 278, 282 (2000). I do not find this
11 argument persuasive because there is no evidence in the record on
12 whether there was an asset purchase, an assignment of rights, or
13 simply a name change. The lack of evidence about what kind of
14 transaction occurred casts doubt on the applicability of this case.
15 Absent evidence of an asset purchase known to Pacificorp, the
16 theory leads nowhere.

17 In any event, regardless of what kind of transaction occurred,
18 there is no dispute that Winbo International had express authority
19 from Baoding to act as its general agent, and express authority,
20 through the supplementary agreement, to change its "name or nature"
21 and be bound by the terms of the agreements between Winbo
22 International and Baoding. There is no evidence that Baoding ever
23 sent an invoice to Pacificorp or otherwise directed Pacificorp to
24 send its payments to Baoding.

25 3. Has Baoding generated a genuine issue of fact on
26 the issue of whether Pacificorp made full payment
27 under the purchase contracts?

1 Baoding asserts that there is a genuine issue of fact as to
2 whether Pacificorp discharged its entire obligation under the
3 purchase contracts, because Pacificorp's payment to Super Power was
4 only partial. Pacificorp counters that Baoding does not even
5 explain, much less offer evidence proving, its claim that
6 Pacificorp's payment was partial.

7 The evidence before the court shows that the initial price
8 under the Johnston contract was \$1,235,000. L. Ni Declaration ¶ 8.
9 The price was later increased through negotiations by Winbo
10 International and Pacificorp to \$1,403,370, id., and then reduced
11 to \$1,170,036 after negotiations with Pacificorp subsequent to
12 delivery of the transformers, when Pacificorp complained of delays
13 and errors. Id. at ¶¶ 8, 9; Johnson Supp. Declaration, Exhibit 2
14 (purchase order printout from Pacificorp procurement department
15 reflecting price increase as of January 17, 2003).

16 Winbo International had express authority from Baoding to
17 communicate with Pacificorp on commercial matters, to negotiate the
18 purchase contracts and to receive payments from Pacificorp. There
19 is no evidence in the record that this express authority was
20 revoked until September 11, 2005, after Pacificorp had made its
21 last payment under the purchase contracts. Moreover, Pacificorp has
22 proffered evidence that Baoding was aware of the price reduction on
23 the Johnston purchase and had worked with Winbo International to
24 address Pacificorp's complaints and reach a resolution. Ni
25 Supplemental Declaration ¶ 6; Johnson Supplemental Declaration,
26 Exhibits 3 (email from Winbo International to Baoding), 4 (email

1 string between Baoding and Winbo International about Pacificorp's
2 complaints), 5 (explanation from Baoding for errors complained of
3 by Pacificorp), and 6 (email string involving Pacificorp and Winbo
4 International dealing with price adjustments). All of this evidence
5 establishes that Pacificorp reasonably believed that Winbo
6 International/Super Power had authority to negotiate the price to
7 be paid by Pacificorp, and that Pacificorp paid the price so
8 negotiated.

9 Baoding has not generated a genuine issue of material fact
10 with respect to its claim that Pacificorp's payments under the
11 purchase contracts were incomplete.

12 I conclude that Baoding has not met its burden of showing the
13 existence of a genuine issue of material fact, such that a
14 reasonable jury could conclude that 1) Pacificorp knew or should
15 have known that it should not make payments to Super Power; or 2)
16 that Pacificorp failed to make all payments due under the purchase
17 contracts. Pacificorp is entitled to summary judgment in its favor.

18 B. Super Power and Winbo International's Motion to Stay and to
19 Compel Arbitration

20 Super Power and Winbo International move the court for an
21 order compelling Baoding to arbitrate the disputes between them in
22 accordance with the arbitration clause contained in the
23 supplementary agreement, which provides:

24 Any dispute arising between the parties shall be resolved
25 through consultations in the first instance. If no
26 agreement is reached through consultations, such dispute
27 shall be referred to the Chinese International Economic
28 and Trade Arbitration Commission for arbitration. The
Agreement shall be governed by Chinese laws.

1 Johnson Declaration, Exhibit 5.

2 The strong federal policy in favor of arbitration applies with
3 equal force to international contracts. See, e.g., Schenk v.
4 Alberto-Culver Co., 417 U.S. 506, 519-20 (1974). The policy is
5 manifested by Congress's adoption of the Convention on Recognition
6 and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208.

7 Baoding's opposition to the motion to compel arbitration is
8 premised on its argument that Super Power is a stranger to the
9 contracts because it is the successor to Winbo USA, not Winbo
10 International, based on the records from the California
11 Corporations Division. Baoding contends that it was unaware of the
12 name change and the fact that Super Power was receiving money from
13 Pacificorp under the purchase contracts.

14 The record does not support this argument, because it shows
15 that Baoding was informed of the name change and received payments
16 under the purchase contracts from Super Power. See Declaration of
17 L. Ni in Further Support of Third Party Defendant's Petition to
18 Compel Arbitration ¶¶ 6, 8, Exhibits A and C, Haussecker
19 Declaration, Exhibit B.

20 Baoding asserts that Super Power has not provided any
21 documentation or evidence proving that it is the same entity as
22 Winbo International and therefore that Super Power is not a party
23 to the agreements between Winbo International and Baoding.
24 According to the Declaration of Renee Stineman, even counsel for
25 Super Power and Winbo International have agreed that Winbo
26 International and Super Power are not the same corporate entity,

27

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1 and that there has been no assignment of the agreements. Stineman
2 Declaration ¶ 4.

3 I find this argument unpersuasive for two reasons. First, the
4 language of the supplementary agreement does not require that Winbo
5 International remain the same corporate entity as Super Power or
6 assign the contract to a separate corporate entity. The
7 supplementary agreement expressly permits Winbo International to
8 change its "name or nature," and still "automatically" bind the new
9 company to the agency agreement, the cooperation agreement, and the
10 supplementary agreement, "without separate execution." Johnson
11 Declaration, Exhibit 5.

12 Second, Winbo International has joined in the motion to stay
13 and to compel arbitration. There is no doubt that Winbo
14 International is both a party to the arbitration agreement and a
15 party to this lawsuit, and therefore has standing to petition for
16 enforcement of the arbitration provision.

17 Super Power makes a number of arguments that under general
18 contract and agency principles, a nonsignatory may enforce an
19 arbitration agreement against a signatory under different theories,
20 including 1) equitable estoppel; 2) a sufficiently close
21 relationship between the signatory and nonsignatory; 3) the
22 existence of an agency relationship between the signatory and the
23 nonsignatory. See, e.g., Comer v. Micro, Inc., 436 F.3d 1098 (9th
24 Cir. 2006) (equitable estoppel); C.D. Partners LLC v. Grizzle, 424
25 F.3d 795 (8th Cir. 2005) (close relationship between signatory and
26 non-signatory and agency relationship). The record does not raise
27

1 a material issue of fact on the question of whether Superpower is
2 the same entity as Winbo International, nor does the supplementary
3 agreement require Winbo International to refrain from changing its
4 "name or nature." The language of the supplementary agreement makes
5 it unnecessary to reach this argument.

6 As an alternative to its argument that Super Power is not a
7 party to the arbitration agreement, Baoding asserts that if the
8 court should find the claims asserted by Baoding against Super
9 Power are subject to arbitration, the court should not order
10 arbitration in China, citing Bauhinia Corp. v. China Natal Mach. &
11 Equip. Imp. & Exp. Corp., 819 F.2d 247, 250 (9th Cir. 1987) ("In
12 absence of a term specifying location, a district court can only
13 order arbitration within its district.") Baoding points out that
14 the arbitration clause at issue states that the dispute is to be
15 referred to an arbitration service, the Chinese International
16 Economic and Trade Arbitration Commission (CIETAC), but nowhere
17 identifies a forum for arbitration.

18 In response to this argument, Super Power asserts that an
19 arbitration clause specifying a particular organization to
20 administer the arbitration is treated as an exclusive forum
21 selection clause, and the arbitration must be held before that
22 administrator. Super Power cites In re Salomon, Inc., 68 F.3d 554,
23 557-58 (2d Cir. 1995).

24 In Salomon, the Second Circuit joined two of its sister
25 circuits in holding that designation of a particular arbitrator can
26 also constitute a forum selection clause. See also Luckie v. Smith

1 Barney, Harris Upham & Co., 999 F.2d 509 (11th Cir. 1993) (per
2 curiam); Roney & Co. v. Goren, 875 F.2d 1218 (6th Cir. 1989) (all
3 involving arbitration of securities cases before self-regulatory
4 associations such as the New York Stock Exchange pursuant to the
5 AAA). Super Power argues that the court need only compel
6 arbitration and refer the current disputes to CIETAC, arguing that
7 as a practical matter, such an order could be the equivalent of
8 ordering arbitration in China. Super Power has attached CIETAC's
9 arbitration rules, which provide that arbitrations are to be
10 conducted in either Beijing or Shanghai, and asks that the court
11 take judicial notice of the rules under Rule 201 of the Federal
12 Rules of Evidence.

13 Super Power cites to the Convention on Recognition and
14 Enforcement of Foreign Arbitral Awards, under which courts are
15 authorized to compel arbitration in China and elsewhere. 9 U.S.C.
16 § 206 ("A court having jurisdiction under this chapter [9 U.S.C. §§
17 201-208] may direct that arbitration be held in accordance with the
18 agreement at any place therein provided for, whether that place is
19 within or without the United States,"); see also Jain v. Deere, 51
20 F.3d 686, 690 (7th Cir. 1995).

21 Super Power also distinguishes Bauhinia, the case relied on by
22 Baoding, because the arbitration clause in Bauhinia specified no
23 location for arbitration and specified no rules under which the
24 arbitration was to proceed. 819 F.2d at 248. In contrast, Super
25 Power argues, the arbitration clause in this case provides for
26 arbitration before CIETAC, which does specify the rules under which

1 the arbitration is to proceed.

2 I conclude that it is unnecessary for me to take judicial
3 notice of CIETAC's rules and order arbitration in China. Although
4 the Salomon case involved arbitration under the FAA, I am persuaded
5 by the Salomon court's analysis to the extent of concluding that an
6 agreement to arbitrate before a particular arbitrator avoids the
7 ambiguity as to forum and rules found in the Bauhinia case, and can
8 also constitute a forum selection clause. Accordingly, the motion
9 by Super Power and Winbo International to stay and to compel
10 arbitration before CIETAC, pursuant to the terms of the arbitration
11 provision of the supplementary agreement, is granted.

12 **Conclusion**

13 Pacificorp's motion for summary judgment (doc. # 49) is
14 GRANTED. The motion by Super Power to stay and to compel
15 arbitration (doc. # 44), joined by Winbo International (doc. # 84)
16 is GRANTED.

17 IT IS SO ORDERED.

18
19 Dated this 10th day of September, 2008.

20
21 /s/ Dennis James Hubel

22 Dennis James Hubel
23 United States Magistrate Judge
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